SUPREME COURT, U. S.

Supreme Court
L E
NOV 18
MICHAEL RODAK, J

IN THE

Supreme Court of the United States

October Term, 1974

No. 74-480

HENRY R. DEERING,
Petitioner,

v.

CITY OF SEATTLE, a Municipal Corporation, and THE SEATTLE CIVIL SERVICE COMMISSION, HERBERT STEPHENS, Chairman, E. A. COOK and MERLIN BROWN, Members,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS, DIVISION I, OF THE STATE OF WASHINGTON

BRIEF OF RESPONDENTS IN OPPOSITION

Office and Post Office Address:
10th Floor, Seattle Munic. Bldg.
Seattle, Washington 98104
Telephone: 583-2338

JOHN P. HARRIS
Corporation Counsel
The City of Seattle
Attorney for Respondents

CRAFTSMAN & MET PRESS SEATTLE, WASHINGTON

SUBJECT INDEX

	Page
Questions Presented	1
Seattle City Charter and Seattle Civil Service Rules Involved	2
Statement of the Case	3
Argument	5
Conclusion	8

TABLES OF AUTHORITY

Table of Cases

Arnett v. Kennedy, ... U.S. ....., 40 L. Ed. 2d 15, 94 S. Ct. 1633 (1974)	5
Deering v. City of Seattle, 10 Wn. App. 832, 520 P.2d 638 (1974)	6, 7
Luellen v. Aberdeen, 20 Wn.2d 594, 148 P.2d 849 (1944)	4
State ex rel. Perry v. City of Seattle, 69 Wn.2d 816, 420 P.2d 704 (1966)	4
Ward v. Village of Monroeville, 409 U.S. 57, 34 L. Ed. 2d 267, 93 S. Ct. 80 (1972)	7
Wilson v. City of Minneapolis, 283 Minn. 348 168 N.W.2d 19 (1969)	7

Other Authority

Seattle City Charter, Art. XVI § 9	3
§ 12	2-3, 4
Seattle Civil Service Rule 12.03	3
Supreme Court Rule 23(f)	8

IN THE

Supreme Court of the United States

October Term, 1974

No. 74-480

HENRY R. DEERING,
Petitioner,

v.

CITY OF SEATTLE, a Municipal Corporation, and THE SEATTLE CIVIL SERVICE COMMISSION, HERBERT STEPHENS, Chairman, E. A. COOK and MERLIN BROWN, Members,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS, DIVISION I, OF THE STATE OF WASHINGTON

BRIEF OF RESPONDENTS IN OPPOSITION

QUESTIONS PRESENTED

1. Where applicable provisions of the Seattle City Charter governing the City's civil service system provide that the head of a department may dismiss a civil service employee who has completed his probationary period by filing with the Civil Service Commission a statement in writing of the reasons therefor, and where such a dismissed employee is en-

titled to a *de novo* hearing before the Civil Service Commission, did alleged due process violations occurring at a departmental hearing prior to termination so affect the subsequent Civil Service Commission proceedings that the dismissed employee was denied due process?

2. In the context of a civil service system created by the provisions of a municipal charter, does the purported denial of due process to an employee during a hearing held by the City department which employed him raise any significant constitutional question where such departmental hearing was neither required or contemplated by applicable charter provisions and where such charter provides a full *de novo* hearing before a municipal civil service commission upon dismissal?

SEATTLE CITY CHARTER AND SEATTLE CIVIL SERVICE RULES INVOLVED

Seattle City Charter, Art. XVI § 9. ". . . The appointing officer shall notify the commission separately of each position to be filled, and shall fill such places by appointment from the persons certified to him by the commission therefor, which appointment shall be on probation for a period of twelve months, except for firemen where such period shall be six months . . . . Before the expiration of the period of probation, the head of the department or office in which a candidate is employed may, by and with the consent of the commission, discharge him upon assigning in writing his reasons therefor to the commission. If he is not then discharged his appointment shall be deemed complete. . . ."

Seattle City Charter, Art. XVI § 12. "Every officer or employee in the classified civil service shall hold office until removed or retired. Any officer or employee whose appointment is complete may be removed by the appointing power only upon the filing with the

commission of a statement in writing of the reasons therefor. Any officer or employee so removed may within ten days after his removal demand an investigation. The commission shall forthwith make such investigation and its finding and decision shall be certified to the appointing officer, and if the removal is not sustained thereby, the officer or employee so removed shall at once be reinstated. . . . In the course of any investigation each member of the commission or their designated agents shall have the power to administer oaths, and shall have the power to require the attendance of any officer or employee or other person and the production of books and papers relevant to such investigation."

Seattle Civil Service Rule 12.03. "a. A regular employee may be discharged upon the filing by the appointing authority of a written statement of the reasons for such discharge with the Commission;

b. The following are declared to illustrate adequate causes for discharge; a discharge may be made for any other good cause;

° ° °

(3) Willful or intentional violation of any lawful and reasonable regulation, order or direction made or given by a superior officer;

° ° °

(5) Incompetency or inefficiency in the performance of the duties of his position. . . ."

STATEMENT OF THE CASE

Petitioner Henry R. Deering was dismissed from his employment as a fireman for the City of Seattle on May 2, 1968. Said dismissal was effectuated by the Chief of the Seattle Fire Department in accordance with applicable provisions of the Seattle City Charter by filing a written statement of the reasons for the dismissal with the Seattle Civil Service Commission. Because petitioner had com-

pleted his probationary period, he was entitled to "demand an investigation" by the Civil Service Commission, provided that such demand be filed within ten days. Seattle City Charter, Article XVI § 12. When such a demand is filed, the same charter provision directs that "The commission shall forthwith make such investigation and its finding and decision shall be certified to the appointing officer. . . ." In *Luellen v. Aberdeen*, 20 Wn.2d 594, 148 P.2d 849 (1944), the Washington Supreme Court construed similar municipal civil service provisions to provide for a hearing after due notice, including the right to present witnesses and be represented by counsel. Petitioner was accorded such rights before the Seattle Civil Service Commission, and, indeed, exercised such rights.

After receiving evidence from both the Seattle Fire Department and the petitioner, the Civil Service Commission concluded "as its independent judgment on the merits of the matter," that "Henry R. Deering displayed incompetency and inefficiency in the performance of his duties as a fireman and in spite of the over eight years service, during which time training opportunities were afforded him, he failed to acquire satisfactory knowledge of the required fire department's subjects and failed to develop the skills of individual firemen," and that such dismissal "was for just cause." As clearly indicated by the wording of the decision and in accordance with the construction of the applicable charter provisions by the Washington Supreme Court in *State ex rel. Perry v. City of Seattle*, 69 Wn.2d 816, 420 P.2d 704 (1966), such decision was rendered upon a *de novo* basis upon the merits of the dismissal.

The provisions of the Seattle City Charter do not require

or provide for any sort of hearing at the departmental level prior to the time that the department head files the written dismissal statement with the Civil Service Commission. However, the Chief of the Fire Department had promulgated regulations providing that cases involving possible suspension or dismissal would be heard by a "Trial Board" consisting of a panel of three chiefs. Because neither the Civil Service Commission nor the King County Superior Court deemed that the proceedings before the Seattle Fire Department "Trial Board" were of any relevance to their functions in reviewing the petitioner's dismissal, no evidence was taken as to what transpired at the hearing before such "Trial Board," and the only information in the record as to what did transpire before such "Trial Board" is the rather argumentative offer of proof made to the Civil Service Commission by the attorney who represented petitioner in the hearing before said Commission.

ARGUMENT

The principal theory advanced by petitioner as to why this court should grant his petition for a writ of certiorari is his claim that he was entitled to a hearing prior to his separation from City employment, and because of the alleged procedural defects, the hearing before the Seattle Fire Department's "Trial Board" did not constitute the sort of pretermination hearing which he contends is required by due process concepts. However, in *Arnett v. Kennedy*, ... U.S. ....., 40 L.Ed.2d 15, 94 S. Ct. 1633 (April 16, 1974), a majority of this court rejected the contention that a pretermination hearing is always required before a governmental employee may be dismissed from his employment. Two Justices of this court in the *Arnett*

case placed great weight upon the fact that under the procedures applicable to that case the discharged employee would heve recovered back wages if he prevailed before the Civil Service Commission upon the merits of his claim, and in the case at hand petitioner would similarly have been awarded back wages if he had prevailed before the Seattle Civil Service Commission.

Furthermore, at no time during the proceedings before the Civil Service Commission of The City of Seattle, or in the courts below, did petitioner contend that due process concepts require a pretermination hearing before a governmental employee may be dismissed. See *Deering v. City of Seattle,* 10 Wn. App. 832, 836-837, 520 P.2d 638, 641 (1974).

A further problem with petitioner's contention is that he ignores the proper relationship of the departmental action to the process specified in the Seattle City Charter for the review by the Civil Service Commission of dismissals of Seattle employees who have completed their probationary period. As pointed out by Division One of the Court of Appeals of the State of Washington in the instant case:

> "The trial board's only function was to investigate the charges against Deering and to make a disciplinary 'recommendation' to the fire chief. Therefore, Deering suffered no 'deprivation' as a consequence of that hearing. His deprivation occurred when he was discharged by the fire chief."

Deering v. City of Seattle, 10 Wn. App. 832, 836, 520 P.2d 638, 640 (1974). Said court also noted in its decision that under the Seattle City Charter procedures, "After an employee's demand for an 'investigation,' his 'discharge' be-

comes at most a temporary 'suspension' and the 'reasons' assigned by the chief for his dismissal become merely charges which the department must prove to the satisfation of the commission in a de novo proceeding." *Deering v. City of Seattle*, 10 Wn. App. 832 836, 520 P.2d 638, 641 (1974). The established charter procedures are important, because, as pointed out by the Supreme Court of Minnesota in response to a similar contention in *Wilson v. City of Minneapolis*, 283 Minn. 348, 168 N.W.2d 19, 22 (1969):

> "So far as the courts are concerned, the power and duty of the superintendent of police of the city of Minneapolis to suspend employees for disciplinary purposes is fixed by the charter of that city and the rule of its Civil Service Commission, unaffected by the superintendent's order announcing the procedures to be employed by him in suspension cases.
>
> • • •
>
> "The superintendent of police is given the authority and the duty to suspend temorarily those subject to his jurisdiction when in his judgment this is necessary for purposes of discipline. He is not authorized or required to make the exercise of this function dependent upon a 'formal hearing.' "

Because the only hearing contemplated or required by the Seattle City Charter is the hearing before the Civil Service Commission, the trial court was correct in holding that the hearing before the Seattle Fire Department's "Trial Board" "was without legal significance." Also for such reason the decision in *Ward v. Village of Monroeville*, 409 U.S. 57, 34 L.Ed.2d 267, 93 S. Ct. 80 (1972), is without relevance, because the hearing in that case which was found to violate due process was a judicial trial conducted pursuant to and in the manner contemplated by applicable state statutes.

Petitioner contended in the courts below that he was

denied procedural due process in the proceeding before the Seattle Fire Department's "Trial Board" and such denial of procedural due process, (which purportedly took place notwithstanding the presence of his attorney), somehow prejudiced his rights in the subsequent hearing conducted bythe Civil Service Commission. However petitioner failed in the courts below to explain in any way or to give any reasons as to how his rights were prejudiced before the Civil Service Commission, and the State of Washington Court of Appeals correctly rejected his contention that he had somehow been prejudiced in some unspecified way.

Petitioner now seeks to correct this failure at pages 21-26 of the petition by attempting to explain how and why he was prejudiced in his hearing before the Civil Service Commission by the alleged due process violations occurring during the hearing of the Seattle Fire Department's "Trial Board." Since this argument was not presented to the courts below and is now urged for the first time it cannot properly form a basis for the granting of the petition. Supreme Court Rule 23(f).

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition of Henry R. Deering for a writ of certiorari should be denied.

Respectfully submitted,

JOHN P. HARRIS
Corporation Counsel
The City of Seattle
Attorney for Respondents